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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944.

No. 575

COLORADO-WYOMING GAS COMPANY, a corporation, PETITIONER,

vs.

FEDERAL POWER COMMISSION; COLORADO INTERSTATE GAS COMPANY, a corporation; CITY & COUNTY OF DENVER, COLORADO; PUBLIC SERVICE COMMISSION OF WYOMING; PUBLIC SERVICE COMPANY OF COLORADO, a corporation; and CANADIAN RIVER GAS COMPANY, a corporation, RESPONDENTS.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DONALD C. MCCREERY,
PAUL W. LEE,
GEORGE H. SHAW,
WM. A. BRYANS, III,
CHARLES J. KELLY,
1217 First National Bank Bldg.,
Denver, Colorado,
Attorneys for Colorado-Wyoming Gas Company, Petitioner.

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REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE QUESTIONS PRESENTED.

Commission counsel declare the only issues which are presented herein are the questions of jurisdiction, allocation and whether the reduced rates ordered by the Commission are "just and reasonable" *(Comm. Br. p. 2)*.

To each of these issues counsel adroitly devote about a page of carefully selected words of assertion and implica-

tion and quotation from the Commission order. Clearly these issues of admitted significance, as well as other issues also of significance, including those addressed both to the meaning and propriety of this Court's opinion in the *Hope Natural Gas Company* case cannot be settled by the mere silence of an order denying certiorari, which this Court is urged by the Commission to enter.

Here again, if the contentions of this petitioner, involving basic issues of government under constitutional and enacted law, are without merit, the absence of that merit can be shown convincingly and can be readily stated. That the opinion in *Hope Natural Gas Company* case is in fact a *radical departure* from the past, including the immediate past next prior to *January 3, 1944*, certainly is not and cannot be controverted. It is universally so understood by *all* who have given consideration to that opinion of this Court. It would seem, therefore, that "A decent respect for the opinion of" the American people and of both the federal and state judiciaries as well "requires" this Court "to declare the reasons that impel" it and the authority which permits it thus to remold, or appear to remold, the ordered and orderly structure, powers and duties of American government established by "We the people" and by Congress "in pursuance thereof," in which body "all legislative power * * is vested."

The issues as to scope of review, presumption on review and the substantive standards which govern Commission and Court *(Pet. Br. pp. 24-44)* are airily disposed of on the ground that those "questions involve alleged errors in recent decisions of this Court which we deem unnecessary to discuss". *(Comm. Br. p. 7)*.

Heretofore, the Commission habitually has been quite vocal in its views for and against the opinions of this Court, and particularly in support of dissenting opinions. Does the present silence suggest an entire confidence that, whether the *Hope Natural Gas Company* opinion be correct or erroneous, it will not be disturbed, or can it be that the Commission presently does not have adequate answer to the contentions of this petitioner respecting such issues of law?

With respect to petitioner's discussion of the foregoing issues of law, which directly relate to the judicial duties of

this Court and its lawful authority in the premises, counsel claim to find that "the petitioner does not discuss the 'impact' and 'end result' of the Commission's order, and by its argument *(Pet. Br. pp. 22-44)* impliedly concedes that the rate reduction prescribed by the Commission meets this standard" *(Comm. Br. p. 10)*. Such an assertion had better have been left unstated, for no person who reads and understands language could possibly conclude *from petitioner's petition and argument*, or any part thereof, anything other than that the Commission procedure and order in this case is both illegal and lawless, in concept, in detail, in conclusion, in "impact," in "end result" and "in consequences." The numerous and specific grounds and reasons supporting petitioner's contentions are set forth. These the Commission and its counsel meet by silence. Rationalization, reasoning and argument are not clever and irresponsible mental devices and avenues to attain a desired end. Inherent therein is the quality of integrity of thought requiring consideration of and regard for both facts and principles.

Next following the above quoted sentence, counsel declare: "In any event, the financial history of petitioner would not sustain an argument that the Commission's rate order is not 'just and reasonable'" *(Comm. Br. p. 10)*. To this statement and the ensuing discussion and assumptions of counsel we will advert, *post*.

The factual questions presented, to-wit: original cost, service life, accrued depreciation, going value and rate base also are brushed aside in silence or by mere assertion that they are "without merit" or that the Commission action is "supported by substantial evidence" *(Comm. Br. pp. 2, 7, 12)*. These were presented and discussed briefly in petition for certiorari and supporting brief, *upon the record facts and the applicable decisions of this Court.*

CERTAIN OF THE RECORD FACTS.

The answering brief of the Federal Power Commission requires correction both of statement and of implication to produce conformity with the record facts and the applicable law.

Character of this Proceeding.

This case is not part of a "consolidated proceeding" *(Comm. Br. p. 3),* involving also Canadian River Gas Company and Colorado Interstate Gas Company (petitioners before this Court, in cases Nos. 379 and 380, this Term). The proceeding against this petitioner *throughout* has been entirely separate from and independent of the proceedings against the companies above named, which companies are entirely separate from and independent of this petitioner, in management, control and operation. The three proceedings, however, were by order of the Commission consolidated *"for purposes of hearing thereon" (R. V. 1, pp. 41-44).* Thereafter and notwithstanding the attempted consolidation of the hearings, the proceeding against this petitioner *in fact* was heard by the Commission examiner as a wholly independent matter. A separate and distinct record was made before the Commission, and thereafter this case was presented to the Circuit Court of Appeals and now to this Court on that independent record. While certain general principles of law were common to the three cases, none of the issues in this case were common or identical, either in fact or in law, with the issues in Canadian River Company and Colorado Interstate Gas Company cases. The briefs before the Commission, before the Court of Appeals and now before this Court attest to that fact.

Throughout this proceeding, despite the independence of companies, of issues and the separation of hearing and record, both the Commission and its counsel, by action, implication and statement *whenever* it has *suited,* have assumed such identity of issue between the three cases and the three companies themselves, with the result that several of the substantial issues affecting this petitioner have been ignored, by-passed and disposed of in silence or by evasion. The footnote *(Comm. Br. p. 12)* renders lip service to the mere *formalities* of "due process." Obviously, it is intended thereby to assure this Court that throughout, this petitioner, *as a separate and independent litigant,* was accorded that separate and independent treatment to which, as a separate and independent litigant, it was and is entitled by law. But the Commission procedure and order are not predicated upon any such separation in fact or in substance, as counsel in their footnote suggest to this Court. That

footnote suggestion is directed only to "the 'due process' contentions advanced by the petitioner." It, of course, has no place in their argument, when the Commission disposition of the issues of "jurisdiction" and "allocation", for example, is being defended. In the latter connection the argument of counsel is directly to the contrary, to-wit: that instead of being "separate," this petitioner Colorado-Wyoming Company is part and parcel of Colorado Interstate and Canadian River companies *(Comm. Br. pp. 3, 8, 9)*. So we find the Commission on the opposite sides of the same question of separation in its presentation before this Court, as heretofore throughout this case. This sort of procedure is not the *substance* of due process,—"the rudiments of fair play."

The order of rate reduction entered against this petitioner is separate, distinct and *in no manner* conditioned by the orders entered against Canadian River and Colorado Interstate companies *(R. V. 1, pp. 87-90, 90-94, 94-97)*. The order in this case reduces the annual revenues of petitioner Colorado-Wyoming company $119,000 as of 1939. This order is *absolute in its terms* and does not depend upon the final disposition of the Canadian River and Colorado Interstate cases. It is true that, if the orders in those two cases are affirmed, this petitioner will receive a credit of $98,000 in the annual cost of purchased gas as an offset against the $119,000 *(Comm. Br. p. 11)*. But if the orders in the other two cases be set aside, petitioner has no basis to assume that the Commission (to the orders of which body this Court appears to attribute the quality of virtual finality) would make a "pragmatic" or other adjustment of its order against this petitioner.

In any event, $21,000 *a year* to this small petitioner is substantial, and will recur and accumulate from now on year after year. This pyramiding process will produce a very substantial and imposing ascending total. This is true for the reason that, in the event of affirmance, the Commission theories and conclusions, as applied in this case, become final and *res adjudicata* with respect to jurisdiction, original cost, accrued depreciation, rate base, allocation and all other issues actually adjudicated.

Commission "Original Cost."

The Commission "original cost," *despite the silence* of the Commission in its order and the silence of counsel in their brief *is not the actual* original cost in fact or as shown by the books of petitioner *(Op. Comm. R. V. 1, p. 53)*.

Commission counsel state with respect to engineering design and construction services in the amount of $83,000 that that item "was questioned by the staff in accordance with the Commission's established rule of 'no profits to affiliates' and, as the record shows, the Commission made an ample allowance for engineering services and expenses (R. III, Ex. 199, p. 84)." *(Comm. Br. p. 12)*

The Commission *excluded* from its so-called "original cost" as "computed" by Commission witness *Vaught, all charges for design and construction engineering* (Test. Comm. witness *Vaught, R. V. 1, pp. 287-288, 203)*. This was a part of the *actual* "cost or gross investment" of Colorado-Wyoming Company in the amount of $82,793 *(R. V. 2, p. 551, R. V. 3, Comm. Ex. 199, p. 4)*. They do not dispose of *the fact* that design and construction engineering services are *essential* in the building of every natural gas pipeline transmission and distribution system, and a necessary part of the "original cost" of every such system.

The fact that such services were rendered by, and payment therefor made to an affiliate, may raise the question for consideration as to whether the amount of the payment made to such affiliate was reasonable. But the *fact* remains that such services were necessary and must be incorporated in any real determination of actual "original cost." In this case, *this* integral part of "original cost" is eliminated and ignored by the Commission without as much as a reference thereto *(Op. R. V. 1, pp. 52-53)*. Nevertheless, the so-called "original cost" as "allowed" by the Commission is paraded as the *entire* "original cost" *(Op. R. V. 1, p. 53)*.

Counsel nevertheless find it necessary to undertake to compromise the issue by referring to certain specific engineering items and other non-engineering overheads which were not excluded. They refer for support to *Commission Exhibit 199*. Yet they overlook the fact that such exhibit

was prepared and presented by Commission witness *Vaught*, who on cross-examination testified that after the elimination by him (adopted by the Commission) of the "5% engineering fees" of $82,793, "there are no charges of any kind covering designing and construction engineering in any amount, so far as he knew" *(R. V. 1, p. 203)*.

Even if the burden was upon the Company to justify as reasonable the particular contract with its affiliate for such services, that did not meet or discharge the burden "incumbent" on the Commission *(Op. R. V. 1, p. 79)*. In arriving at a rate base even under its own erroneous theory of rate base, it was required both by law and equity to include the reasonable cost or value of this vital and necessary element of design and construction engineering. Even a so-called "original cost" determination is not complete without it.

Such a procedure as *the entire elimination* of all engineering design and construction is not a pragmatic adjustment. It is the total repudiation of property rights. If 5% be *found* to be unreasonable, the pragmatic adjustment is the determination *from evidence* of such lesser amount as is *found* to be reasonable.

"Going Value."

"Going value" was summarily disposed of by the repudiation *as a matter of law* of that element of plant and property value as "without merit" *(Comm. Br. p. 12)*, on the statement "this Commission and other regulatory agencies in general have consistently condemned * * * such fictitious element of value" *(Op. Comm. R. V. 1, p. 68)*, despite numerous decisions of this Court to the contrary, which decisions, so far as this petitioner can learn, have not been overruled (See *Los Angeles Gas & Electric Corp. v. Railroad Commission*, 289 U.S. 287, 53 Sup. Ct. 637; *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104, and *Denver Union Stockyards Co. v. United States*, 304 U.S. 470, 58 Sup. Ct. 990).

Counsel cite *Federal Power Commission v. Natural Gas Pipeline Company*, 315 U.S. 575, 589, on the proposition that "there is no constitutional requirement that going concern value * * * must be separately stated and appraised as such." With that statement of this Court we have no contro-

versy but, as pointed out specifically and documented, "going concern value" was not allowed in this case *in any form*. The Commission witness *Vaught* testified expressly to that effect. (See *Open. Br. Pet. pp. 50-53.)*

"Service Life" and "Accrued Depreciation."

The Commission *in fact* made no determination of "accrued depreciation" whatever. It merely advanced arguments and indulged conclusions as to the soundness of the theory of service life to determine accrued depreciation *(R. V. 1, pp. 59-61, 65)*. The Commission so-called "accrued depreciation" is a simple arithmetic proration of the *assumed* "service life" adopted by it *(Comm. witness Smith, R. V. 2, pp. 531, 556-562, Comm. Br. p. 4)*. Throughout this case this petitioner has contended, and documented that contention by specific consideration and analysis of *all* the relevant evidence in the record, that the adopted "service life" is without the support of "substantial evidence." Both Commission and its counsel consistently have evaded consideration of the basic facts essential to an *adjudicated* determination of service life *(Op. Comm. R. V. 1, pp. 59-61, 65)*. It would seem to be both sound and easy to dispose of that issue by an examination and presentation of the evidence, in the event that the Commission conclusion is supported by "substantial evidence," as now for the first time is asserted by counsel in one brief sentence *(Comm. Br. p. 12)*. Why then such hesitation and refusal to meet a material *factual* issue, directly and specifically?

It would appear both desirable and important, therefore, that this Court at this time should have some understanding of the *Commission* evidence which this petitioner contends amounts to sheer guess and speculation. What then does the evidence show, for example with respect to pipelines, *which constitute about 80% of the Company plant*, whether measured in cost or in value? As to the service life of pipelines, the Commission admits there is serious controversy *(Op. Comm. R. V. 1, p. 65)*, and then without findings or even consideration of the facts upon which such service life must be predicated, proceeds as though the service life assumed by it had been established by evidence.

On the subject of "depreciation," the Commission opinion is peculiarly inept *(R. V. 1, pp. 59-61, 65-66)*. The inevit-

able discovery made by reference to the evidence explains the resort to argumentative and paratactic generalizations, evidently prepared by the Commission accounting staff. The only Commission evidence which even purports to relate to the subject of depreciation is that presented by the witness *Copp (R. V. 1, pp. 462-503, R. V. 3, Comm. Ex. 200, Appendix).* To be sure, there was the Commission "depreciation accounting witness" *Smith,* but he admitted on cross-examination that he had no conception of what is meant by per cent condition, or loss of service value, and which he described as "absolutely meaningless" to him *(R. V. 2, p. 558).* The depreciation computation made by him *(Comm. Ex. 202, p. 10, R. V. 3, Appendix)* and adopted by the Commission in its opinion, "is an accounting entry based upon an engineering estimate of service life" *(R. V. 2, pp. 530-531, 556).*

The applicable principles and delineations repeatedly and uniformly declared by this Court and other courts and commissions throughout the land, including this Commission, in its definition of "depreciation" *(Uniform System of Accounts, p. 4)* are clear and settled.

"*Accrued depreciation*" *is a fact,* as this Court has declared repeatedly. It is the determination of the actual physical condition and loss of service value of the property of the utility subject to depreciation, and is to be ascertained as of the date of the rate inquiry, or as close to such time as is reasonably practical. It is not a matter to be determined and fixed by the application of theoretic and academic computations by accountants, or others with neither training nor experience in engineering, operation and management of natural gas companies.

Accordingly, inspections and examinations of the physical plant of petitioner were made in October, November and December, 1939, by Company engineers *Hancock* and *Willard* and Commission engineers, including the witness *Copp.* These Company and Commission inspections of pipelines were made at the same time, in manner and at 83 locations directed and approved by the Commission *(R. V. 1, pp. 381-382, 384, 386-387, 451-453, 463-467).*

The Company presented in evidence the detailed findings

and conclusions of its engineers resulting from such inspections and examinations. *(R. V. 14 pp. 381-450, 451-459, Ex. Nos. 107-110, pp. 382-391; R. V. 3, Ex. 111, Appendix.)* The arithmetical average per cent condition or loss of service value shown by property classifications was: Pipe Lines 92.46%; Compressor Stations 93.04%; Measuring Stations 94%; Regulators, Meters and Main Line Services 88%; Minor Items of Personal Property (office equipment, automobiles, tools and telephone line) 72% *(R. V. 1, pp. 385-387, 451-452)*. The overall average service value of all property was found to be 92.24%; the "loss of service value" or "accrued depreciation" of 7.76% *(R. V. 3, Ex. 111, St. No. 2)*.

The Commision in its opinion conveniently omitted all reference to "accrued depreciation" as a fact and to the evidence on that subject *(R. V. 1, pp. 59-61)*.

The Commission offered no evidence whatever on the subject of present service value or per cent condition of the Company's depreciable plant and system, although it is to be borne in mind that the engineers for the Commission, including the Commission witness *Copp*, inspected the pipeline system of the Company, at the same time and at the same 83 inspection holes as approved and designated by the Commission, presumably for the purpose of determining the then service value or condition of the pipeline system.

The Commission did, however, offer in evidence, through its engineer *Copp*, what was described as "Colorado-Wyoming Gas Company—Determination of Composite Service Lives" *(Ex. 200, R. V. 3, Appendix)*.

It is these service life estimates which petitioner contends are without the support of substantial evidence. And it is these service life estimates from which, by simple proration *(R. V. 2, pp. 556-559)*, the Commission arrives at its so-called "accrued depreciation" of 23.52% *(R. V. 1, pp. 66, 53)*.

Before considering the character of this study and its value in this case, it is to be noted that as to "the causes to be given consideration" in the determination of depreciation, as detailed in the definition of depreciation *(Uniform*

System of Accounts, Definition 14, p. 4), the witness *Copp* testified fully.

"Wear and tear, decay, action of the elements," of course, were related directly to the inspection and examination of the property, made both by the witness *Hancock* and the witness *Copp*. *Copp* testified that he made the same eighty-three inspections, as did the witness *Hancock*, and stated, "It carried some weight, exactly how much I don't know * * *." *Copp* made no definite checks as to inadequacy. He stated it was unimportant and was considered "but was not given much weight." Obsolescence as an element was considered practically negligible and given but "slight weight." "Changes in the art" did not enter into consideration with either the witness *Hancock* or the witness *Copp* as a factor of any consequence. "Changes in the demand and requirements of public authorities," *Copp* considered inconsequential and gave it "slight weight." Exhaustion of natural resources relating to the gas supply of Colorado-Wyoming Company was considered without importance by the witness *Copp*, both in relation to the Wellington Field, now exhausted, and the present supply obtained from Colorado Interstate Company, because he assumed the life of the gas supply was greater than the maximum service life which he assigned to any part of the Company's property. Under "other causes," *Copp* considered "substitute fuels", which he classed in importance "a little more than slight." Similarly, "floods and storms" were given very slight weight, based on the Company's experience. "Maintenance and retirements" were considered by the witness *Copp* as having but "slight" weight. The experience of other pipeline companies was considered to a very minor extent.

(R. V. 1, pp. 470-483, 492-500.)

From a review of this portion of the testimony of the witness *Copp*, it appears that these various causes or factors referred to were entirely inconsequential elements, and with this particular conclusion of that witness we see no occasion to disagree. In 1939 none of petitioner's plant was more than 15 years old and by far the greater portion of it was of less age than 10 years *(R. V. 3, Ex. 111, Sh. No. 4)*.

Now, passing to a consideration of *Commission Exhibit 200*, wherein it is attempted to establish what is termed "Composite Service Lives" of the property of Colorado-Wyoming Company, the witness *Copp* testified at the very outset of his cross-examination that such exhibit was not prepared or offered to show "the then condition of the property" at the time of his inspection thereof, but only "for the purpose of annual depreciation charges" *(R. V. 1, pp. 468-469)*. He testified that the various factors considered by him were used as "guides," and that in determining service life his conclusions were "based primarily on the physical life." "The physical life was given one of the greatest weights." *(R. V. 1, p. 469)*. "We have given the physical life of the pipe considerable weight in determining the service life" *(R. V. 1, p. 484)*. "The deterioration was considered as the principal factor" *(R. V. 1, p. 485)*; however, no evidence of either physical life or deterioration was offered. The specific factors to which reference has already been made were given that slight and nebulous weight indicated which, in effect, amounts to no weight whatever.

"A. We determined a physical life for each of the different sizes of pipe in the line and then we arrived at a composite for all of them.

"Q. You mean total physical life?

"A. That is correct.

"Q. And you looked on that in 1939—you looked back at 1928 and looked forward to '88, something like that—

"A. That is right.

"Q. Standing in the middle you say "There it is, and here it is, and this is the total"?

"A. That is right.

"Q. Now, that assumes what—a perfectly uniform set of conditions during the whole period, does it?

"A. That is right.

(R. V. 1, pp. 485-486.)

By such a procedure the Commission witness looked around at the system, and casting his eyes to the horizons of the past, the present, and the future, speculated as to what had happened and what would happen in the future through an extended range of years. Naturally the witness was unable to testify even generally as to the facts, factors and methods producing his service life estimates, for the obvious reason that such support was wholly lacking. Thus, the opinions of an expert in this instance become, in reality, merely the speculations of a guesser. While a service life determination cannot be precisely or mathematically accurate, yet being essentially a fact determination, it must be rooted in actuality to be acceptable for any purpose.

The witness stated he had "certain guide calculations" which were three in number. With respect to the main transmission line, by the first method he found an approximate service life of 137 years; by the second method, 100 years; and under the third method, 55 years. Having arrived at these conclusions, the witness found a new undisclosed formula, and finally arrived at a 50-year composite service life for the main pipeline. The main line includes 10-inch, 8-inch, 6-inch pipe and some 2-inch pipe. With respect to the lateral lines, which include sizes which range from 8-inch down to 1-inch by the first method he arrived at a composite service life of 164 years; by the second method, 92 years; and by the third method, 35 years; and thereafter finally determined a service life on the lateral lines of 40 years.

(R, V. 1, pp. 491-494.)

A few observations with respect to *Copp's* service-lives estimate, it is believed, will be helpful to the proper consideration of the problem of depreciation. He gives the Fort Collins-Cheyenne 6-inch *main* line a service life of 50 years, *because it is main line*, while he gives the Colorado Portland Cement Company 6-inch *branch* line and the Loveland-Johnstown-Greeley 6-inch main *branch* line service lives of 40 years, *because he classes these lines as branch lines.* This, in face of the facts evident in the record, approaches the absurd. With respect to the Fort Collins-Cheyenne line, according to "depreciation accounting witness" *Smith (Comm. Ex. 201)*, that line in the ten-year

period (1930-1939) lost 20% of its service value, while in the same ten-year period the Loveland-Johnstown-Greeley line lost 25% of its service value.

Similarly, the Commission witness gave the 8-inch *main line* from Boulder Junction to Fort Collins a service life of 50 years, and the 8-inch Boulder *main line branch* a service life of 40 years, although both lines were laid in the same year, are the same size, have the same wall thickness, weigh the same and are of the same kind of pipe. So, in the ten-year period (1930-1939), according to the "depreciation accounting witness" of the Commission *(Comm. Ex. 201)*, the 8-inch main line utilized 20% of its service life, while in the same interval of time the 8-inch Boulder branch lost 25% of its service value. With respect to these lines, it is thus claimed that in 1970 the "expired service value" of the 8-inch Boulder line will be 100%; while the "expired service value" of the 8-inch main line will not be exhausted until 1980.

Such are typical applications of "the Commission's method." This may be accounting, but it is not "consistency," it is not "harmony," it is not "agreement" and it is not fact. Such procedure simply does not make sense.

It is elementary that an expert may give his opinion and conclusions upon a given set of facts. It is equally elementary that the opinion or conclusion of the expert must be based upon facts appearing in the record in which such conclusion or opinion is given. This record contains no facts whatsoever to support the service life estimates of the Commission's witness *Copp*. His conclusions, adopted by the Commission, are mere speculative guesses. Without attempting to cast any reflection upon the witness, so far as this record is concerned, the service lives given might just as well have been 25, 75, 100 or 137 years, and had he given any one of these figures, it could not be said that any one of them would not be as correct as the ones given.

COMMISSION JURISDICTION IN THIS CASE.

Commission counsel defend the assumption by the Commission of rate-regulatory jurisdiction over local "sales for resales" of petitioner in Colorado, as follows:

"The gas purchased by petitioner from the Colorado (Interstate Gas) Company originates in the Panhandle Field in Texas and flows through the interconnected pipeline of the Canadian Company and Colorado Company, from Texas, through New Mexico, to a point near Littleton, Colorado. There the gas flows without interruption into the main pipeline of petitioner, which runs approximately 114 miles to Cheyenne, Wyoming, where petitioner sells for resale to the Cheyenne Light, Fuel and Power Company. Petitioner's facilities also include compressor stations and a number of lateral lines through which sales are made in Colorado for resale. Sales are also made directly to industrial consumers in Colorado and in small quantities to two United States army posts" *(Comm. Br. p. 3)*.

"But under the decision of this Court in *Illinois Natural Gas Company v. Central Illinois Public Service Company*, 314 U.S. 498, 508, it is clear that in transporting Texas gas from Littleton, Colorado, and selling it at various 'city gates', in Colorado for resale petitioner 'engages in interstate commerce in gas and in its interstate transportation' within the meaning of the Natural Gas Act." *(Comm. Br. pp. 7-8)*

In short, this contention is that gas flows without interruption from Texas to the various "*city gates*" in Colorado at which gas is sold for resale by this petitioner, and that under the authority of the *Illinois Natural Gas Company* case, *supra*, the interstate transportation and commerce of Colorado Interstate Gas Company, which was complete at the Littleton "gate," nevertheless, extends to and embraces the local Colorado "city gate" sales of this petitioner.

Counsel ignore the fact that this argument of "flow without interruption" as a physical fact extends to the very burner-tip of the smallest domestic consumer in every Colorado city and town. By this argument, based upon the assumed continuity of flow of gas, the transaction by which each of such ultimate domestic consumers purchases gas also would be interstate commerce. It is, of course, immaterial, in connection with this discussion, that the Natural Gas Act does not cover such ultimate sales. The conclusion, never-

theless, is inevitable that *such sales*, under the argument of uninterrupted physical flow, now advanced by counsel, in principle and in fact, constitute interstate commerce. By the argument presently advanced by the Commission, there can be no *intrastate* commerce in natural gas (or electric energy) after that commodity has once passed across a state line. The result is, once in interstate commerce, always in interstate commerce. But see, *East Ohio Gas Co. v. Tax Comm.*, 283 U. S. 465, 51 Sup. Ct. 499, and cases therein referred to.

Furthermore, the reference by counsel to the *Illinois Natural Gas Company* decision is not apt. The quoted statement assumes that the facts of that case and of the instant case are identical. While it is true that "in the *Illinois case*, the Company's facilities were located wholly in the State of Illinois and it there purchased gas which had been brought into the state from Texas and Oklahoma" and that "the Company transported such gas to various city gates in Illinois where it was sold to distributing companies for resale." Yet, the essential facts are fundamentally different in the two cases. In that case, the Panhandle Eastern Pipe Line Company and Illinois Natural Gas Company "are operated as a single system for the production, gathering, transportation and sale in interstate commerce of natural gas, principally for resale, and it is not controverted that the separate corporate entities may be disregarded" for the reason that Panhandle Eastern and Illinois Natural "are under common control and ownership, and are operated as a single, interconnected and integrated system for the production, gathering, transportation, sale and delivery of natural gas" (*Detroit v. Panhandle Eastern Pipe Line Company*, (F.P.C. 1942) 45 P.U.R. (ns) 203, 207-208, 222). Thus, the Power Commission declared and found in a rate-regulatory proceeding involving both Panhandle Eastern and Illinois Natural companies. The rate reduction order in that case treated Panhandle Eastern and Illinois Natural as one corporation. The result, of course, was that the contract by which Panhandle Eastern sold gas to the Illinois Natural was completely ignored by the Power Commission as simply an intra-company transaction. The rate reduction order of the Commission, of necessity, was based upon the sales by

the single enterprise, at the various "city gates" in Illinois and elsewhere. The identity of the two companies is also reflected in the opinion of this Court in the case of *Illinois Natural Gas Company, supra*, where it is said "Appellant, an Illinois corporation, is a wholly owned subsidiary of Panhandle Eastern Pipe Line Company, *. * * That appellant and Panhandle Eastern are engaged in interstate commerce in the purchase and sale of the natural gas which moves in a continuous stream from points without the state into appellant's pipes within the state seems not to be open to question." (314 U. S. 498, 502, 503) That case, as pointed out by this Court in the *Hope Natural Gas Company* opinion, *supra*, related to the jurisdiction of the Commission over the extension of facilities under *Section 7* of the Natural Gas Act and not to the rate-regulatory authority under *Sections 4 and 5* of this Act. Similarly, the Circuit Court of Appeals for the 8th Circuit, in reviewing the order of the Commission in the rate-regulatory proceeding of Panhandle Eastern, states "The petitioners are Panhandle Eastern Pipe Line Company and its wholly owned subsidiaries, Illinois Natural Gas Company and Michigan Gas Transmission Corporation. Their separate holdings constitute a single system for the gathering, transportation and sale of natural gas, and appropriately may be regarded and referred to as though jointly owned and operated by the petitioners" *(Panhandle Eastern Pipe Line Company v. Fed. Power Comm., 143 Fed. (2d) 188, 190)*.

The facts in the instant case are totally and fundamentally different, in that petitioner, Colorado-Wyoming Gas Company, as pointed out in our brief supporting petition for writ of certiorari herein, is entirely separate and independent in management, control and operation from Colorado Interstate Gas Company, and throughout the proceeding was so recognized by the Commission as wholly separate from and independent of Colorado Interstate Gas Company, save only that the Commission resorted to the fiction of "integration" for purposes of enlarging its jurisdiction and for purposes of allocation. The petitioner is and has been merely a purchaser of gas from the Colorado Interstate Gas Company and nothing else at any time. This petitioner has no part, in fact or in law, in the production

of the gas in Texas by Canadian River Gas Company or in the transportation of it from Texas to the Littleton "gate" by Colorado Interstate Gas Company. This entire and complete independence of the three companies is recognized throughout the opinion and the order of the Commission in this case.

The purchase of gas by this petitioner at Littleton, Colorado, from Colorado Interstate Gas Company is regulated by the Commission order fixing the Littleton "gate" price (*Colorado Interstate Gas Company v. Federal Power Commission, et al.* now pending upon petition for writ of certiorari in this Court, No. 380 this Term). The Littleton sale and purchase completed the interstate transportation and commerce involved in the movement of gas from the Texas Panhandle Field to Littleton, Colorado. That sale and purchase is identical with the Attleboro sale and purchase of electric energy in the case by that name. Such purchase and sale at Littleton was not subject to state authority and, as stated by the Congressional Committee and by this Court, that purchase at the end of the interstate journey was the transaction sought to be subjected to federal regulation by the Natural Gas Act, as in the Federal Power Act. The very fact that the Commission could and did regulate the Littleton "gate" price was a determination and adjudication that the gas transported in interstate commerce from Texas had reached the destination of its interstate journey at the Littleton "gate." If it were a fact that Colorado Interstate Gas Company and Colorado-Wyoming Gas Company constituted an integrated system under the same ownership, management, control and operation as in the *Panhandle Eastern and Illinois Natural* case, then there would have been no authority in law to assert jurisdiction to fix the Littleton "gate" rate, for the reason that the transaction in such situation would have been simply an intra-company matter. In the *Panhandle Eastern* case, *supra*, because the *Panhandle Eastern* and *Illinois Natural* companies were in fact and in law one company and one enterprise, "the separate corporate entities" were disregarded and properly, with the result that the only rates for natural gas upon which the rate-regulatory authority of the Commission could operate were the local city "gate rates" in Illinois. The contrary is true in fact and in law in this

case. It is only because this petitioner and Colorado Interstate Gas Company were and are separate and independent in all respects, that the Commission had authority to determine the Littleton "gate" rate and did exercise that authority.

The contention of counsel when examined on principle and by reference to the *Illinois Natural Gas Company* case, *supra*, relied upon by counsel, falls of its own weight, because that contention depends upon assumptions contrary to the record facts in this case. Here the Colorado "city gate" rates are purely local to Colorado, once the Littleton "gate" rate to this petitioner has been determined and fixed by the Commission.

THE SCOPE OF JUDICIAL REVIEW, THE PRESUMPTION ON REVIEW, AND THE SUBSTANTIVE STANDARDS CONTROLLING COMMISSION AND COURT.

Petitioner again directs the attention of this Court to the significant questions relating to the *prescribed* scope of judicial review, the *character* of the presumption on review in favor of the Commission action, and the *substantive* standards controlling Commission and Court in the exercise and review of the rate-regulatory authority under the Natural Gas Act, as to which the Commission now is silent *(Comm. Br. p. 7)*. These questions require consideration of the constitutional principles and legislative mandates respecting, defining and controlling the duties and powers of the administrative and judicial branches of the federal government. To neither the administrator nor the judge is delegated legislative choice.

This Court most recently, in the *South Eastern Underwriters Ass'n case*, had occasion to review and again to declare that Congress, having power to enact, *and Congress having done so*, this Court has no function to supervise the wisdom or policy of such legislation, and that whether the errors thought to have been committed by Congress were those of commission or omission, yet this Court cannot refuse to respect the action of the legislative branch if within the constitutional power of that body.

We quote from the opinion of *Mr. Justice Black*:

"Appellees argue that the Congress knew, as doubtless some of its members did, that this Court had prior to 1890 said that insurance was not commerce and was subject to state regulation, and that therefore we should read the Act as though it expressly exempted that business. *But neither by reports nor by statements of the bill's sponsors or others was any purpose to exempt insurance companies revealed.* And we fail to find in the legislative history of the Act an expression of *a clear and unequivocal desire of Congress to legislate only within that area previously declared by this Court to be within the federal power.* • • • *We have been shown not one piece of reliable evidence that the Congress of 1890 intended to freeze the proscription of the Sherman Act within the mold of then current judicial decisions defining the commerce power.* On the contrary, all the acceptable evidence points the other way. • • •"

• • • • •

"• • • *Whether competition is a good thing for the insurance business is not for us to consider. Having power to enact the Sherman Act, Congress did so; if exceptions are to be written into the Act, they must come from Congress, not this Court.* And as was said in answer to a similar argument that the Sherman Act should not be applied to a railroad combination:

"'It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions. • • •

"'*But even if the court shared the gloomy forebodings in which the defendants indulge, it could not refuse to respect the action of the legislative branch of the government if what it has done is within the limits of its constitutional power.* The suggestions of disaster to business have, we apprehend, their origin in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case; *at any rate, the sugges-*

tions imply that the court may and ought to refuse the enforcement of the provisions of the act if, in its judgment, Congress was not wise in prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restraint of such commerce and the monopolizing or attempting to monopolize such commerce, shall be illegal. *These, plainly, are questions as to the policy of legislation which belong to another department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy.* * * *" Harlan, J., affirming decree, Northern Securities Co. v. United States, 193 U.S. 197, 351, 352, 24 S. Ct. 436, 462, 48 L. Ed. 679." (Emphasis added.)

United States v. South Eastern Underwriters Ass'n, (July, 1944), ... *U.S.* ....., *64 Sup. Ct. 1162, 1175-1176, 1178.*

In the statements on behalf of the Federal Power Commission, the sponsor of the Federal Power Act and the Natural Gas Act, we find the "expression of a clear and unequivocal desire" to discard and repudiate the principle of "fair value" and substitute therefor the so-called "actual legitimate prudent cost" rate base *(Sec. 208 (c),* originally numbered *211 (c)* of the Federal Power Act, *Appendix D, Pet. for Cert., p. 20-a). But* "we fail to find in the legislative history of the Act an expression of a clear and unequivocal desire of Congress to legislate" as urged by the Commission. "On the contrary, all the acceptable evidence points the other way." That Congress "desired," clearly and unequivocally, not to disturb the law as to rate base as *it then was* is manifest from the following: (1) The proposed prudent investment rate base was stricken in its entirety from the enacted statute; (2) the terms "prudent investment" or "prudent" were not used in any manner or at all by Congress; (3) Congress even refused to insert the word "prudent" in the Federal Water Power Act *(Appendix C, Pet. for Cert., pp. 9-a-10-a);* (4) in the Senate and House Joint Report re Natural Gas Act, recommending the passage of the Act (and it was passed as recommended), it was stated "that the Act provided 'for regulation along recognized and more or

less standardized lines' and that there was 'nothing novel in its provisions', H. Rep. 709, *supra*, p. 3. • • • Sec. 4(a) and Sec. 5(a) contain only the *conventional* standards of rate making for natural gas companies." (*Hope Natural Gas Company* opinion, 64 Sup. Ct. at page 294) and that Section 6 "Subsection (a) authorizes the Commission to investigate and *ascertain* the actual legitimate cost of property, depreciation and other necessary facts for rate making purposes"; (5) Section 6(a) was an adaptation of *Section 211(a)* as originally numbered and offered by the Commission. This subsection the Commission spokesmen (They represented they had authority to and did present the Commission views, *Appendix C, Pet. for Cert., pp. 8-a-9-a)* declared "Now this fits right into the picture of the separation of this property between state and interstate use" and "as being complementary to state regulation" and to "secure a body of information • • • most valuable in the administration of this Act and as an aid to the State Commission in their regulation of consumers" (*Appendix C, Pet. for Cert., p. 17-a, 19-a).* Such spokesmen gave no intimation that "subsection (a) of Section 211" had any relation whatever to rate base. Quite the contrary, it was "*211(c)*", and that subsection *only*, which in *1935* the Commission told Congress related to rate base (*Appendix C, Pet. for Cert., pp. 18-a-19-a);* (6) It required from 1935 and 1938 until 1941 for the Commission to discover and declare that Congress years before, *by indirection*, had established, and, therefore, had intended to establish by indirection, the "prudent investment" rate base which that body specifically and directly had refused to sanction; (7) *it was not until 1941* that this Court, despite the declared Congressional intent, as well as the Commission "discovery" in 1941, also discovered for the first time, and cryptically declared, that the principle of "fair value," the law of the land for fifty years, is now an impossible concept.

Prudent investment and fair value rate bases are entirely different things. The prudent investment theory is not that original cost is value, but that prudent investment is a more desirable rate base than value. However, the adoption and application of a prudent investment rate base

is not within the lawful function of either the Commission or this Court. In neither has been vested the function of *choosing* a rate base. Congress refused expressly and specifically to adopt the prudent investment rate base, and also refused to repudiate and discard the "fair value" rate base. Whatever may be the merits or demerits of the prudent investment theory, the principle is inherent in our system of government that Congress *having acted* in its legislative capacity as here, the Commission is required to determine what the present fair value of the petitioner's property really is. The Commission has no lawful authority to determine a rate base on some other theory which it prefers. Nor is this Court in a different situation than the Commission, for it too is bound equally by the constitutionally exercised authority of Congress, the legislative branch of the government. It is likewise immaterial that this Court may prefer a prudent investment rate base, for the controlling fact remains—Congress by its action has denied to this Court also the function of *choosing* a rate base. The duty of this Court then is not legislative, it is judicial,— that is, to review and restrain the Commission action within the limit and character of authority and the method of its exercise, which that agency may indulge *under law*.

The legislature is presumed to have known the occasion for legislation and to have known also its own legislative intentions. It also is to be assumed that that body embodied those intentions in the enacted law.

> "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."
>
> *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 510, 57 Sup. Ct. 868, 872-873.

The same principles equally are applicable to the consideration and application of the review provisions of *Section 19(b)* of the Act. By that section also, we are told, Congress was not changing the *then* law of the land respecting the judicial review of action by administrative agencies of the federal government. At the time of passage of both the Federal Power Act and the Natural Gas

Act, the *law* as repeatedly and consistently declared by this Court was settled and clear as to the scope of such review. *Section 19(b)* is equally clear: "The finding of the Commission *as to the facts*, if supported by substantial evidence, shall be conclusive." There is absolutely nothing therein about over-all "end result," "total effect," "entirety" or "consequences." That doctrine, as applied by this Court in the *Hope Natural Gas Company* opinion, we are now told was announced in the *Natural Gas Pipeline Company* case (1942), *supra*, and thereafter developed and applied in the *Hope Natural Gas Company* case (1944), *supra*.

In the latter case this Court declares: "And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act," citing the *Natural Gas Pipeline Company* opinion at *page 586 of 315 U.S.* The language in that decision obviously referred to is "If the Commission's order, *as applied to the facts before it* and viewed in its entirety, produces no arbitrary result, our inquiry is at an end." Neither is a formula, but both are statements of purported controlling legal principle. But much more important is the fact that the foregoing sentence from the *Natural Gas Pipeline Company* opinion is a part *only* of a single complete statement and idea stated in the paragraph of which the quoted sentence is the conclusion, both in form and substance.

The preceding language of the paragraph must be assumed to be something other than surplusage. If so, the entire paragraph, not the quoted sentence merely, tells us what this Court in 1942 stated the law to be. That language we quote:

> "The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts can-

not intervene in the absence of a clear showing that the limits of due process have been overstepped. * * *"

Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 586, 62 Sup. Ct., 736, 743.

Before the "end result" doctrine can come into play, four prerequisites must be met according to this 1942 declaration of this Court in the *Natural Gas Pipeline Company* opinion, *supra*, to-wit: (1) "a fair hearing," and all that is involved therein under law, (2) "proper findings made," (3) "statutory requirements satisfied," both by Commission and Court, and (4) "limits of due process" must not be "overstepped." These four prerequisites are not mere words; they relate to the substance of rights and *duties* under our constitutional system. And these fundamental rights and duties obviously were not discarded or repudiated by the last sentence of the paragraph, presently relied upon by this Court. Any such view casts doubt upon the good faith of this Court in 1942.

In 1935 and 1938, when the Federal Power Act and the Natural Gas Act, respectively, were enacted, neither Congress nor this Court, nor any other federal court, nor any person informed as to the law of the land, did or could envision that this Court in 1944, or at any other time, would abdicate the judicial duties imposed upon it by law, and at the same time embark upon a legislative program and policy, directly contrary to the clear and emphatic Congressional policy and action.

The "end result" doctrine, as applied in the *Hope Natural Gas Company* opinion, does not find any support whatever in the statutes under consideration or in *St. Joseph Stock Yards Co. v. United States* (1936), 298 U. S. 38, 56 Sup. Ct. 720, or any other decisions of this Court. It is variously declared by this Court that "unless there has been *error in the result* as well as error in the reasoning," the administrative order must stand *(Dayton Power & Light Co. v. Pub. Utilities Comm.*, 292 U. S. 290, 298, 54 Sup. Ct. 647, 652); "when the legislative method is disclosed, it may have a definite bearing upon the validity of the result reached" *(Chief Justice Stone* dissenting in *West v. Chesapeake & Pot. Tel. Co.*, 295 U. S. 662, 693, 55 Sup. Ct. 894,

907); and again in the same case "mere error in reasoning upon evidence introduced, does not invalidate an order." "Where the decision below is correct, it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action" (*J. E. Riley Inv. Co. v. Comm'r Int. Rev.*, 311 U. S. 55, 59, 61 Sup. Ct. 95, 97). These and similar statements reflect the unquestioned law that, if the result *measured* by the issues of material fact in the record, and the law controlling the determination of such issues *is correct*, the court of review properly may not interfere with such regulatory result. With this principle of law we have no controversy.

In *Los Angeles Gas & Electric Corp. v. Railroad Commission*, 289 U. S. 287, 314, 53 Sup. Ct. 637, 647, this Court examined with particularity and in detail the *"result," based upon the specific evidence in the record and the controlling law*. In that case errors, assumed to have been made with respect to certain issues of fact, were considered and found to be neutralized by favorable allowances with respect to other elements of the rate base, *measured in the common denominator of dollars, that is, value*. This Court therein declared "* * * it is the function of the Court * * * to examine the result of the legislative action in order to determine whether its total effect *is to deny to the owner of the property a fair return for its use.*"

Similarly, in *Dayton Power and Light Co. v. Public Utilities Comm.*, 292 U. S. 290, 296, 54 Sup. Ct. 647, 651, this Court specifically appraised the end "result," *on the record and the issues of fact therein, as presented by the evidence*. "In determining the base on which a fair price is to be reckoned" as to "the value of the gas fields" of the Company in that case, this Court examined *in detail* the evidence upon and the determination by the Commission of that issue and the disposition made of it by the Supreme Court of Ohio. This Court then concluded *on the record evidence relating to that specific question* that "the property interests of the appellant" had not been confiscated. The fact, that "what was said and what was done" by the Commission were different, was immaterial, because "what was done," *based on the record*, did not result in confiscation of the gas fields of the utility there involved.

Under the law, "result" is measured and circumscribed by the requirements that there be "substantial evidence" upon the specific issues involved, and that controlling law applicable to the particular case, both sustain and justify "the conclusions reached." This principle does not permit the taking or appropriation of *any portion* of the utility's property. The truly novel doctrine of *Hope Natural Gas Company* case, as a practical matter, permits the appropriation with impunity of any amount of the property of the utility up to the point that such taking interferes with the ability of the utility to continue to do business and render service. These two concepts are widely variant and in fact irreconcilable.

Thus, neither of the decisions of this Court referred to *supra*, directly or by implication, is authority for the proposition: that a result *contrary* to correct reasoning can stand; or that a result predicated upon grounds upon which the Commission action cannot be sustained, can stand; or that a result, unsupported by substantial evidence as to issues of material fact, can stand; or that a result in disregard of or contrary to the terms of the statutory charter of regulatory authority, can stand; or that a result however wrong, under which the utility can manage to survive and continue to render service, can stand.

Both before the enactment of the Federal Power Act in 1935, after the enactment of the Natural Gas Act in 1938, and in each of the intervening years this Court consistently acted upon and in recognition of the principle of "fair value" as the controlling law. This settled state of the law necessarily is reflected in the Congressional declaration that that body *intended* nothing new or novel. In both acts in question Congress delegated to the Federal Power Commission rate-regulatory authority, which that agency did not before have, *but* Congress made it entirely clear that the authority so delegated was to be exercised in accordance with the *then* standards of law applicable to public utility rate regulation. These are described by Congress and by this Court as the "recognized," "standardized" and "conventional" standards of rate making.

See:

Los Angeles Gas & Elec. Corp. v. Railroad Comm. (1933), 289 U. S. 287, 305, 53 Sup. Ct. 637, 644;

Lindheimer v. Illinois Bell Tel. Co. **(1934)**, 292 U. S. 151, 164, 54 Sup. Ct. 658, 663;

Dayton Power & Light Co. v. Public Utilities Comm. **(1934)**, 292 U. S. 290, 296, 54 Sup. Ct. 647, 651;

Clark's Ferry Bridge Co. v. Pub. Service Comm., **(1934)**, 291 U. S. 227, 235, 54 Sup. Ct. 427, 429;

West v. Chesapeake & Pot. Tel. Co. **(1935)**, 295 U. S. 662, 671, 55 Sup. Ct. 894, 897;

St. Joseph Stock Yards Co. v. United States **(1936)**, 298 U. S. 38, 53, 54, 56 Sup. Ct. 722, 726, 727;

Ohio Bell Tel. Co. v. Public Utilities Comm. **(1937)**, 301 U. S. 292, 305, 57 Sup. Ct. 724, 730-31;

Railroad Comm. v. Pacific Gas & Elec. Co. **(1938)**, 302 U. S. 388, 394, 58 Sup. Ct. 334, 338;

Driscoll v. Edison Light and Power Co. **(1939)**, 307 U. S. 104, 114, 59 Sup. Ct. 715, 720.

In *Driscoll v. Edison Light and Power Company, supra*, for instance, this Court clearly and specifically adhered to the principle that even in the fixation of temporary rates under a state statute, the Commission may not disregard present cost, omit indirect and overhead items of construction and exclude allowances for working capital and going concern value. The Pennsylvania Commission having in fact interpreted the act and applied it in conformity with the fundamental requirement "that it must weigh all the essential elements of valuation required by our past decisions," this Court held that it was not necessary to inquire into the constitutionality of the enactment in question. Turning then as a court of review to the question of confiscation, this Court examined and considered with particularity the findings of the Commisison with respect to *each* issue of material fact as to which the claim of confiscation was alleged. The entire procedure of this Court in that case was in conformity with the then established and long settled law. In 1939, this Court did not suggest or imply that *even* in a confiscation case in a court of equity the test of present confiscation was or could be "past profits" and the conclusion that, despite the order objected to, the utility could survive and continue to render service in the future. Nor did this Court in that case give the slightest indication that the "findings of fact by * * * an administrative agency" need not be "supported by substantial evidence" and the other fundamental require-

ments discussed by *Mr. Justice Brandeis* in the *St. Joseph Stock Yards Company* case, *supra*. The concept of "end result," "impact" and "consequences," presently the view of this Court, was not then "novel;" it had never been heard of at that time; and certainly cannot be read into the provisions of the Natural Gas Act specifically granting judicial review of the Commission findings and order on the record. The doctrine of *Hope Natural Gas Company* case, *supra*, stands alone and in opposition to *all* law of the land. It is "novel," and much more!

ALLOCATION.

The whole question of allocation is disposed of summarily by counsel *(Comm. Br. pp. 8-9)* in the following manner: (1) The Commission is not required to make "an allocation of property." "The Natural Gas Act does not prescribe any method of allocation, nor even require that any formal allocation be made"; (2) "All that can be accomplished by an allocation of physical *property* can be attained by allocating costs *including the return*"; (3) "Contrary to petitioner's contentions (Pet. 4) the Commission's use of *the peak day on the system* as the basis of allocating the capacity costs was appropriate in the circumstances (R. I, 79; R. II, 761). Moreover, the Commission used '*the coincident demands' of all customers on that day* (R. I, 82) and thus *recognized the service priority* of domestic consumers"; and (4) "As the record shows, this resulted in an *increased allocation of costs to the interstate sales* which are subject to the Act, and a proportionately lower rate reduction in such sales (R. II, 735)." (Emphasis added.)

The first and second of the foregoing arguments ignore the law, while the third and fourth are contrary to the record facts in this case. To each thereof, brief answer will be made in the order of their statement by counsel.

(1) The necessity for an "allocation of property" in the proportion in which it is used for and in which it is not used for the business subject to lawfully exercised rate-regulatory control, cannot be disposed of simply by assertions of counsel in the face of and contrary to existing and controlling law of the land. The law in that behalf is clear and uniform as are all decisions of this Court and other

federal courts on that subject. (See *Opening Br. of Pet. herein, pp. 54-58).* True, the Natural Gas Act does not mention "allocation." Nor did the Commission draft of the Federal Power Act, yet the authorized *(Appendix C, Open. Br. Pet., pp. 7a-9a)* spokesmen who presented the Commission draft and views declared to Congress: "In this separation, we know of no way of dividing it other than that specified by the Supreme Court of the United States in the Minnesota rate case. Where you can ascertain the cost of the property, you can readily determine what percentage of the property is used in interstate commerce and what percentage is used in intrastate commerce * * *" *(Appendix C, Open. Br. Pet., p. 17a).* The necessity for such allocation arises not from the terms or provisions of any statute but from the basic fact that "it is essential" under our constitutional system of government when the rate-regulatory jurisdiction exercised does not embrace all the operations or the facilities in their entirety of the regulated business *(Smith v. Illinois Bell Tel. Co.*, 282 U. S. 133, 148-149; 51 Sup. Ct. 65, 68-69). In this case, the Commission statutory rate-regulatory authority does not extend to intrastate operations or to direct sales to ultimate consumers. Domestic consumers have priority over others. And, of course, as this Court has many times declared, it is not the function of either Commission or Court "to provide a more comprehensive scheme of regulation than Congress has decided upon." Neither the Interstate Commerce Act nor other federal or state rate-regulatory acts mention "allocation." (See: *Simpson v. Shepard*, 230 U. S. 352, 33 Sup. Ct. 729, 753; *Smith v. Illinois Bell Tel. Co.*, 282 U. S. 133, 51 Sup. Ct. 65; *Columbus Gas & Fuel Co. v. Public Utilities Comm.*, 292 U. S. 398, 54 Sup. Ct. 763). Counsel's contention evades but does not meet the requirements of law respecting allocation.

(2) Counsel for the Commission quote the Commission,—sort of a boot-tugging operation—to the effect that the Commission so-called "allocation of costs" accomplishes all that could be attained by "allocation of physical properties." This wholly unsupported assertion, *which neither Commission nor counsel undertake to demonstrate*, is offered in justification of the deliberate and admitted non-compliance with the law requiring "allocation of property." This controlling principle has not been repealed or overruled.

"* * * if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law.

* * * * *

"* * * an administrative order can not be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."

Securities and Exchange Comm. v. Chenery Corp., (1943) 317 U. S. 80, 63 Sup. Ct. 454, 462.

The Commission "allocation of costs," as quoted by counsel, is predicated upon "allocating costs *including the return*." (Emphasis added.) This is directly contrary to the principle first laid down by this Court in *Simpson v. Shepard*, 230 U. S. 352, 33 Sup. Ct. 729, 765, and followed consistently in numerous later cases, cited *infra*, all of which decisions Commission and counsel blithely ignore.

(3) Counsel's reference to "the peak day on the system," if not a direct statement, is a direct implication that the "system" meant is the system of this petitioner, Colorado-Wyoming Gas Company. This reference is directly linked to the next sentence, where it is said "The Commission used 'the coincident demands' of all customers on that day," *for the so-called "co-incident demands" relate to "customers" of this petitoner only (R. V. 3, Comm. Ex. 227, Table 2, Cols. 7, 8, 9)*. The "peak day" used by the Commission was not the peak day deliveries of gas to or of this petitioner on February 9, 1939, or at any other time. It was the "peak day delivery" of the Colorado Interstate Gas Company on February 9, 1939 *(R. V. 1, pp. 142, 186-187, 358; R. V. 2, pp. 728-729, 735-736, 738, 751, 760-763)*. Nor were the so-called "coincident demands of all customers" used by the Commission *(R. V. 3, Comm. Ex. 227, Table 2, Cols. 7, 8, 9)* the *actual* coincident demands of the customers of petitioner on the Colorado Interstate Gas Company "peak day delivery" *(R. V. 1, pp. 186, 358)*. The next statement of counsel by way of conclusion that the illegal Commission method

"thus recognized the service priority of the domestic customers" is directly contrary to the testimony of the sole Commission witness on allocation.

> "Q. Mr. Lyon, did you give consideration or effect in your study to the fact that at the present time the entire capacity of the Colorado-Wyoming system is required to satisfy peak day demands of domestic consumers?
>
> "A. No effect."
>
> *(R. V. 2, p. 786)*
>
> (See also *R. V. 2, pp. 730-731*)

(4) Counsel finally assert that the illegal Commission method "resulted in an increased allocation of costs to the interstate sales" which benefited petitioner. The implicit statement is that such alleged benefit is apparent from a comparison between the Commission method and an "allocation of property" as required by law. The assertion of counsel is contrary to fact. The record reference cited *(R. V. 2, p. 735)* has nothing whatever to do with an allocation of property, or a comparison of such an allocation with the Commission method of "allocation of costs." The comparison, at the page cited, relates to two different "allocations of cost" by the Commission staff, neither of which involved "allocation of property" in any degree or at all.

Such then is the unreliable fabric of the contentions now made in support of the Commission "allocation of costs," which is both erroneous in law and contrary to the record facts. Nevertheless, Commission and its counsel thus defend it as "a working one suitably adapted to the particular circumstances," that is, a substitute not permitted by law, but asserted to be just as good as the real thing.

THE SUBSTANCE OF "DUE PROCESS."

Counsel *(Comm. Br. pp. 2, 10-11)* undertake to dispose of this fundamental question by parading the assumed earnings of petitioner from 1925 to 1939 as barring this petitioner from any rights of present or future protection from lawless and arbitrary action of the Commission in 1942. The argument indulged is that "the financial history" of past earnings determines whether future earnings hereafter to

be *permitted* by the Commission reduction order will be "fair and reasonable," or, conversely stated, confiscatory. The use of the term "confiscation," counsel obviously avoid, and no doubt advisedly. *For this is retroactive law with a vengeance.* This demagogic contention is not supported or permitted by the record facts, or by the established law of the land, and particularly by "the rudiments of fair play."

The contention rests upon the assumption that this is a "confiscation" case, so-called, and not a *statutory* review specifically predicated on the record and the findings as to the facts disclosed by that record *(Open. Br. Pet. pp. 24-37)*. It is further assumed that the "confiscation" against which petitioner is entitled to protection is not that confiscation declared and applied heretofore by this Court (See, *Los Angeles Gas & Electric Corp. v. Railroad Comm.*, 289 U.S. 287, 53 Sup. Ct. 637; *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 56 Sup. Ct. 720), but a newly devised and restricted concept of "confiscation" measured only by sounding phrases, presumably announced in *Federal Power Comm. v. Hope Natural Gas Company*, 320 U. S. 575, 64 Sup. Ct. 281. The assumption also must be indulged that, while the Commission admittedly has no jurisdiction whatever over past profits prior to the enactment of the Natural Gas Act or prior to any order of rate reduction, yet such alleged past profits nevertheless can be ~~restored~~ resorted to *and given effect* in order to justify and validate a Commission order which obviously cannot be defended otherwise, or it would be so defended. Involved also is the repudiation and over-ruling of the established principle that "profits of the past cannot be used to sustain confiscatory rates for the future" *(Board Public Utility Commrs. v. N. Y. Telephone Co.*, 271 U. S. 23, 32, 46 Sup. Ct. 363, 366; *Los Angeles Gas & Elec. Corp. v. Railroad Comm.*, 289 U. S. 287, 313, 53 Sup. Ct. 637, 647, and cases cited). The foregoing assumptions are necessary corollaries to the so-called "end result" or "impact" theory now apparently in vogue. That this theory represents a new and novel ideology in American government is demonstrated by the cold fact that it cannot prevail in harmony with the century-old and uniform stream of judicial pronouncements of this Court. Such is the "impact" of this new theory of governmental powers, functions and duties.

Now as to the asserted facts which counsel relate: We are told that in 1931 there was a "stock dividend" of 45,000 shares (par value $100.00) of stock of "the recorded value" of $1,500,000. What happened was this: 10 shares were issued December 1, 1925, upon payment of $1,000 in cash; 4990 shares were issued December 18, 1925, upon payment of $76,800 in cash. Thereafter, on December 21, 1931, there were issued 45,000 shares. For this stock Public Service Company of Colorado *paid $1,500,000 in cash.* This $1,500,000 covered repayment to Henry L. Doherty & Co. of $1,139,075.67, the then balance of *construction funds* theretofore *admittedly* advanced by said Henry L. Doherty & Co. to this petitioner, and $360,924.33, the "earned surplus which the Company had earned prior to December, 1931." The Commission witness *Smith* described this stock issuance as a "stock dividend" and to do this he refers to the balance of construction funds advanced, $1,139,075.67, as a "donated surplus"—*(R. V. 2, pp. 549-551; R. V. 3, Comm. Ex. 202, St. B-6, Ex. 137)*, although in the stock purchase by Public Service Company that company paid to Henry L. Doherty & Co. the sum of $1,139,075.67. The stock issued *to liquidate* the advance of construction funds in the amount of $1,139,075.67, however designated, was in fact the purchase of stock for that amount of actual money expended in capital construction, *and then an outstanding and unpaid indebtedness of this petitioner.* "Accuracy has its claims" even in a proceeding such as this has developed to be.

Next counsel state "*In addition* to the stock dividend, petitioner paid cash dividends which by the end of the test year, 1939, totaled $1,445,000 (R. 111, Ex. 202, p. 8)." This statement of counsel is contrary to the facts. The *total* dividends paid or disbursed by this petitioner were $1,445,000. No dividends whatever were paid by this petitioner prior to 1931. Whatever part, if any, of the $360,924.34 earned surplus as of December, 1931, was disbursed at any time as a dividend, was declared and paid thereafter and as a part of the $1,445,000. Moreover, the sum of $1,139,075.67, *covering payment of the balance of the capital indebtedness incurred up to 1931*, was not a stock dividend or a dividend at all. It was a payment of debt *(R. V. 3, Comm. Ex. 202, St. B-5)*. It is also true, and upon this, too, counsel are silent, that the dividends paid by this petitioner included profits derived from

admittedly non-jurisdictional operations over which, *by law*, the Commission has no rate-regulatory jurisdiction. Such dividends included also profits from *local* Colorado "sales for resale," which if local, as this petitioner contends, also are beyond the rate-regulatory jurisdiction of the Commission. How then, under any ideas of fairness and reason, and even under the "end result" theory that past profits can be used against a utility, can such total dividends, derived from both jurisdictional and non-jurisdictional operations *in the past*, be urged or considered in determining whether the order of rate reduction applicable only to *future* jurisdictional operations is "fair and reasonable" and not arbitrary and lawless?

Having sought to apply the first premise of the "end result" theory with respect to "past profits," counsel then contend "The Commission's order *permits* petitioner to earn not less than $132,553 per year from its *utility operations*." By the use of the word "permits," coupled with the words "utility operations," obviously it is expected the conclusion will be indulged by this Court that such earnings accrue only from operations subject to the rate-regulatory control of the Commission. However, such is not the fact. The earnings which the Commission "permits" petitioner to earn on such operations, which *alone* the Commission is *permitted* by the Natural Gas Act to control, are not $132,553 but $88,790 *(Op. Comm., R. V. 1, pp. 78, 95)*. *The balance of earnings* result from "industrial and other direct sales" over which *by law* the Commission has no rate-regulatory control. It is entirely clear though that *in fact*, as disclosed by the foregoing statement as well as the record, the Commission did control and limit *all* earnings of the petitioner, both jurisdictional and non-jurisdictional, and then by its so-called "allocation of costs" assigned a portion thereof to the non-jurisdictional business. This is apparent from the Commission order *(Op. Comm. R. V. 1, pp. 78, 83, 95-96)*. The Commission "allocation of costs" was intended to and does accomplish just this. To the $132,553 earnings, *which are not what they purport to be*, counsel adds interest on a $98,000 loan (not part of the rate base) of $5,900, and then concludes "The income available for dividends on petitioner's *common stock* * * * is the equivalent to a return of 9.08% on the petitioner's combined capital stock and surplus * * * *." Of

course, no rate base whatever was ascertained for that portion of petitioner's property and plant devoted to "sales for resale" (wholly aside from the issue as to the Commission rate-regulatory authority over local Colorado "sales for resale"). The only "rate base" announced by the Commission (and that one is erroneous) is *all* inclusive, embracing all property and plant of petitioner without distinction between jurisdictional and non-jurisdictional uses and operations *(Op. Comm. R. V. 1, p. 78)*. So, in attempting to apply the second premise of the "end result" theory, to-wit: that if the utility can survive and continue to do business, there can be no complaint of "confiscation," likewise on the authority of the *Hope Natural Gas Company* case, *supra,* counsel find it preferable to urge their contention not in terms of rate base but in terms of capital structure. This contention also involves the necessary assumption that earnings over 6½% on the direct industrial business (for under the Commission theory and order the "sales for resale" business, we are told, is limited somehow, without the measure of an applicable rate base, to 6½%) property may be used to defeat any attempt to review as lawless and arbitrary the future earnings *permitted* by the Commission's order to be made from the regulated business.

What kind of due process, either formal or substantive, is this? There is precisely nothing in the Natural Gas Act which could possibly be construed to contemplate such an "end result." Nor does the history of the legislation afford the slightest basis for such "consequences." By what lawful authority then does the Commission and this Court assume the prerogative thus to order and affirm?

Under our plan of government a citizen cannot be "pragmatically adjusted" or "end-resulted" out of his essential rights of property. To suggest that these considerations are all within the range of a pure discretion and to be evaluated or not at the sole will of the Commission is to lose sight of all the tests of expropriation we have hitherto known.

CONCLUSION.

The "impact" upon the law of the land, of the current course of Commission action and of the doctrines of the *Hope Natural Gas Company* decision, *supra*, including the "consequences" of those doctrines, require, in fairness to the common weal, careful consideration and adequate discussion by this Court of the fundamental questions and principles involved. This to the end that such issues may be settled on their merits and that all citizens be advised of the substantial reasons controlling such determination.

Respectfully submitted,

DONALD C. MCCREERY,
PAUL W. LEE,
GEORGE H. SHAW,
WM. A. BRYANS III,
CHARLES J. KELLY,
1217 First National Bank Bldg.,
Denver, Colorado.
Attorneys for Colorado-Wyoming Gas Company, Petitioner.